No. 70-86

In the Supreme Court of the United States

OCTOBER TERM, 1971

UNITED STATES OF AMERICA, PETITIONER

v.

FORREST S. TUCKER

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES

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CITATIONS

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OPINION BELOW

The opinion of the court of appeals (App. 45–56) is reported at 431 F. 2d 1292.

JURISDICTION

The judgment of the court of appeals (App. 57) was entered on September 28, 1970. The petition for a writ of certiorari was filed on Feb. 24, 1971, and granted on May 3, 1971. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether a sentence imposed in 1953 must be vacated because the sentencing judge was aware of

two prior convictions which were defective under the standards established in 1963 in *Gideon* v. *Wainwright,* 372 U.S. 335.

STATEMENT

1. In 1953 respondent was convicted of armed bank robbery in the United States District Court for the Northern District of California. The robbery occurred on December 7, 1951. The evidence against respondent included the testimony of four eyewitnesses, who identified him at trial and at a lineup, and a fingerprint expert, who identified a print found on a teller's cash box as belonging to respondent (App. 1–21). Respondent testified in his own behalf that he was not in the vicinity of the victimized savings and loan institution at the time of the robbery, but had been there two days before to change a fifty dollar bill. On cross examination, government counsel elicited, for purposes of impeachment, admissions of three prior state felony convictions—breaking and entering and theft of an automobile in Florida in 1938; burglary of a jewelry store in Louisiana in 1946; and armed robbery in Florida in 1950. Following the third conviction respondent was hospitalized for removal of his appendix. After he had recovered from the effects of the operation and was waiting to be transported to prison, respondent escaped from the hospital and traveled to California under an assumed name (App. 24–26).

Following the jury verdict, the court conducted a sentencing hearing. An FBI agent furnished information that respondent had been imprisoned for five

years and four months on the 1938 conviction (App. 28–29). The 1946 conviction brought a sentence of four years, but it was not known how much time was actually served (App. 30). In 1950 respondent was sentenced to five years, but (as noted) escaped shortly after he began service of that sentence. Other matters adduced and considered at the sentencing hearing included respondent's background in Louisiana; his marriage in September 1951 and his wife's ignorance of his true identity and activities until the time of his apprehension; respondent's possession at the time of his arrest of a number of valuable assets, including two expensive automobiles and $700–$800 in cash, in spite of his not having been gainfully employed while in California; his indictment in a pending state armed robbery case; and suspicions, supported by fingerprint evidence, that he had participated in several other local robberies involving finance companies or loan offices. Action in these cases had been deferred pending the outcome of the prosecution (App. 30–37). The court stated that it would not take into consideration the armed robbery case already pending under indictment (App. 36), and sentenced respondent to the maximum term of twenty-five years imprisonment.[1]

2. In July 1968 respondent filed a motion to vacate his sentence pursuant to 28 U.S.C. 2255. Underlying his motion was a ruling by the Superior Court of Ala-

[1] A copy of the transcript of the 1953 trial and sentencing proceedings has been lodged with this Court.

meda County, California in 1966[2] that respondent's 1938 and 1946 convictions were defective under a retroactive application of *Gideon* v. *Wainwright,* 372 U.S. 335, because respondent had not been represented by counsel at the time of those convictions (App. 58–59). The district court denied relief.

On appeal, the Court of Appeals for the Ninth Circuit concluded that there was error in the use of the prior convictions at trial and at sentencing. As to the trial, the court found that the use of the tainted convictions for impeachment was harmless beyond a reasonable doubt in view of the other ample evidence discrediting respondent's testimony, as well as the abundant evidence of guilt. It therefore affirmed the conviction. With respect to the sentencing, however, the court of appeals found a reasonable probability

[2] After respondent's federal conviction he was convicted in California on four counts of armed robbery. The 1938 and 1946 convictions were the basis for adjudging him a "habitual criminal", thereby increasing his state sentence under California law. More than 10 years later, shortly after this Court decided *Gideon* v. *Wainwright*, *supra*, respondent attacked the prior convictions in the state courts. In January, 1966, the Supreme Court of California ordered the Alameda County Court to redetermine respondent's status as a habitual criminal in light of *Gideon*. *In re Tucker*, 64 Cal. 2d 15, 409 P. 2d 921. After a hearing, the county court, on June 10, 1966, found the prior convictions defective, and withdrew the order decreeing respondent a habitual criminal. Respondent then filed a petition for a writ of habeas corpus in the federal district court, alleging that the introduction of the prior convictions tainted the jury's determination of his guilt as to the four robbery counts. The district court denied relief, but the Ninth Circuit reversed and remanded. *Tucker* v. *Craven*, 421 F. 2d. 139. A retrial is imminent.

that the defective prior convictions contributed to the imposition of the maximum possible term of imprisonment. It therefore remanded the case to the district court for resentencing without consideration of the invalid convictions (App. 45–48). One judge dissented, characterizing as "pure speculation" the holding that the invalidated prior convictions could have had an effect on respondent's federal sentence, and stressing that, whether or not the convictions were invalidated, the conduct upon which they were based was properly considered in imposing sentence (App. 48–56).

SUMMARY OF ARGUMENT

I. In requiring the district court to reconsider respondent's sentence, the court of appeals failed to take account of the sentencing judge's extremely broad discretion to consider any reliable information in determining an appropriate sentence. The safeguards developed to protect defendants while their guilt or innocence is being determined are simply not necessary in the sentencing stage. Furthermore, the sentencing judge is not required to spell out with precision the factors which have influenced his determination; therefore, the sentence he imposes is not ordinarily subject to appellate review. If courts of appeal were authorized to require reassessment of the sentence imposed by the sentencing judge whenever they did not approve of a sentence, judges who had never been required to list and evaluate the factors which weighed upon their decision in sentencing would be confronted years later with an artificial proceeding seeking to reexamine their mental processes. Indeed,

in many instances, the original sentencing judge would no longer be available.

One of the major factors in the sentencing judge's determination is the defendant's prior criminal conduct. As in other areas, the judge may consider any reliable evidence of the defendant's criminal conduct, whether or not that conduct has resulted or will result in conviction, because for ordinary sentencing purposes, the relevant inquiry is not whether the defendant has been formally convicted of past crimes, but rather, as here, whether he has in fact engaged in criminal conduct, and if so, how extensive that conduct has been. The judge's evaluation of the defendant's pattern of conduct is usually unaffected by subsequent invalidation of convictions.

Burgett v. *Texas,* 389 U.S. 109, relied upon by the court of appeals, is not inconsistent with this principle, because there the fact of conviction itself, as opposed to the fact of the underlying conduct, affected the minimum and maximum sentences that the jury could impose. In this case, the invalidated convictions did not increase the minimum or maximum lawful punishment, but merely became elements in the large number of factors considered by the trial judge in determining an appropriate sentence. Furthermore, *Burgett* postdated this Court's decision in *Gideon* v. *Wainright,* 372 U.S. 335, so that the trial judge there should not have treated the earlier convictions as valid. Here the sentencing judge acted in accord with prevailing constitutional doctrine. Since prior convictions are typically known to the sentencing judge,

a ruling that this sentence must be reopened would require the reopening of a vast number of sentences.

II. There is no need to reassess the sentence imposed in this case, because there is no indication that the invalidation of the prior convictions cast any doubt on the conduct underlying those convictions. At no time during the sentencing proceeding did respondent suggest that he had not committed either of the two offenses for which his convictions were subsequently invalidated, though he did deny having committed the other offense of which he had been convicted. Furthermore, there were numerous factors which might have induced the trial judge to impose a severe sentence on respondent. In these circumstances, it is unlikely that the sentencing judge would have imposed a different sentence if he had known that respondent's convictions would be invalidated.

ARGUMENT

I

THE INVALIDATION OF TWO OF RESPONDENT'S PRIOR CONVICTIONS DOES NOT COMPEL THE SENTENCING COURT TO REASSESS THE ORIGINAL SENTENCE

In requiring the district court to reconsider respondent's sentence eighteen years after its imposition because of the invalidity of two prior convictions which were known to the sentencing judge at the original sentencing proceeding, the court of appeals disregarded two well settled principles of sentencing procedure. First, the court did not take account of the extremely wide latitude accorded a sentencing

judge in the consideration of matters which may influence his decision to assess a particular sentence. In addition, the brief majority opinion failed to recognize that it is the fact of the defendant's prior conduct, not the formal fact of conviction, which is relevant to the sentencing process.

A. THE SENTENCING JUDGE HAS BROAD DISCRETION TO CONSIDER ANY MATTERS WHICH HE DEEMS RELEVANT TO THE IMPOSITION OF A SUITABLE SENTENCE

The most characteristic aspect of sentencing procedure is that the sentencing judge may secure the information used to determine a sentence from any reliable source, and is not in any way bound by rules of evidence fashioned for criminal trials. The nature of the evidence he can consider is almost limitless, as long as it is reliable; he is entitled, and indeed encouraged, to consider information derived from sources whom the defendant has not necessarily confronted, as well as matter unrelated to the crime upon which sentence is being imposed. *Williams* v. *New York,* 337 U.S. 241; *United States* v. *Onesti,* 411 F. 2d 783 (C.A. 7), certiorari denied, 396 U.S. 904; *United States* v. *Trigg,* 392 F. 2d 860 (C.A. 7), certiorari denied, 391 U.S. 961; *Cross* v. *United States,* 354 F. 2d 512 (C.A. D.C.); *Arruda* v. *United States,* No. 24900, C.A. 9, decided April 21, 1970, certiorari denied, 400 U.S. 822. And once the sentence is determined within statutory bounds, it will not be disturbed on appeal except for the most compelling reasons. *Gore* v. *United States,* 357 U.S. 386, 393; *Williams* v. *New York,* 337 U.S. 241; *Scott* v. *United States,* 419 F. 2d

264, 266 (C.A. D.C.); *United States* v. *Rosenberg*, 195 F. 2d 583, 604 (C.A. 2), certiorari denied, 344 U.S. 838; cf. *Townsend* v. *Burke*, 334 U.S. 736.

The rationale for this broad discretion is readily apparent, particularly in the federal courts where the sentencing proceeding is conducted solely by a judge. The safeguards developed to protect defendants while their guilt or innocence is being determined by a jury of laymen are not essential in the sentencing stage; indeed, they would inhibit the judge's attempt to arrive at a penalty that will "fit the offender and not merely the crime." *Williams* v. *New York*, 337 U.S. 241, 247. Because the sentencing judge must fit the punishment to the offender, the offenses and the needs of the community,[3] he necessarily makes a complex judgment, based on all the information available to him. Unlike the appellate courts, he has been able to observe the defendant personally—in most instances during the course of trial as well as at the hearing on the sentence. For these reasons, the appellate courts may not substitute their own assessment of the proper punishment for the one imposed by the sentencing judge. *Blockburger* v. *United States*, 284 U.S. 299, 305.

Furthermore, the sentencing judge is not required to spell out with precision those factors which have influenced his determination of the extent of punishment. For this reason, a court of appeals should not

[3] See National Probation and Parole Association, *Guides for Sentencing* (1957), ch. 4; Thomsen, *Sentencing the Dangerous Offender*, 32 Fed. Prob. 3.

ordinarily review the record to determine which particular factors might have strongly influenced the final assessment. Such a speculative search of the record may well result, as here, in the upheaval of sentences imposed long ago, requiring the sentencing judge to make a reassessment at a time when the setting in which sentence was imposed cannot fairly be reconstructed. Since all of the items which influenced the judge at the time of sentence are not likely to have been recorded, courts which have never been required to list and evaluate the factors which weighed upon their decision in sentencing are confronted years later with an artificial collateral proceeding seeking to reexamine their mental calculations. The problem of reconstruction will be even more difficult when, as will often be the case, the judge originally imposing sentence is no longer sitting and a different judge, without an extensive first hand observation of defendant, must decide upon an appropriate sentence (see page 17, note 10 *infra*).

B. THE SUBSEQUENT INVALIDATION OF A PRIOR CONVICTION DOES NOT NECESSARILY REQUIRE RECONSIDERATION OF A SENTENCE BASED IN PART UPON TH OFFENSE LEADING TO THAT CONVICTION, BECAUSE IT IS THE DEFENDANT'S CONDUCT ITSELF, NOT THE LEGAL CONSEQUENCE THEREOF, THAT BEARS UPON THE SENTENCE

One of the major factors which the sentencing judge takes into consideration in imposing a suitable sentence is the defendant's prior criminal conduct. And it has never been thought that the criminal record which a judge may consider for sentencing purposes is limited to final convictions. Indeed, it has long been

recognized that a sentencing judge may examine any reliable evidence of criminal conduct whether or not it has resulted—or will result—in conviction.[4] *United States* v. *Doyle*, 348 F. 2d 715, 721 (C.A. 2), certiorari denied, 382 U.S. 843; *United States* v. *Onesti*, 411 F. 2d 783 (C.A. 7), certiorari denied, 396 U.S. 904; *United States* v. *Cifarelli*, 401 F. 2d 512 (C.A. 2), certiorari denied, 393 U.S. 987; see also *United States* v. *Eberhardt*, 417 F. 2d 1009 (C.A. 4), certiorari denied *sub nom. Berrigan* v. *United States*, 397 U.S. 909. The judge's broad discretion in this area is in part an aspect of his generally wide latitude to hear any relevant evidence in a sentencing proceeding. It is also a reflection of the fact that for ordinary sentencing purposes, the relevant inquiry is not whether the defendant has been formally convicted of past crimes, but rather, as here, whether he has in fact engaged in criminal conduct, and if so, how extensive that conduct has been. See, *e.g.*, *North Carolina* v. *Pearce*, 395 U.S. 711, 723; *Cross* v. *United States*, 354 F. 2d 512, 514 (C.A. D.C.). The judge's evaluation of the defendant's "pattern of behavior," *Neely* v. *Quatsoe*, 317 F. Supp. 40 (E.D. Wis.), is usually unaffected by subsequent invalidation of convictions.

If the sentencing judge were not authorized to examine unproved criminal activity, an ably counselled

[4] See Parsons, *Aids in Sentencing*, 35 F.R.D. 423, for an extensive discussion on matters which a sentencing judge can review and two sample presentence reports. In one of the reports the draftsman notes that the subject has no convictions, but eight arrests for minor offenses and has another case pending in a state court, 35 F.R.D. at 445–449.

defendant might succeed in shielding from the judge the facts underlying serious charges which have been dropped as a result of prosecutorial discretion or because a plea of guilty to other counts had been entered. Similarly, offenses barred by stale claims statutes would not be taken into account, although they should be. Moreover, a judge would have to refrain from considering the facts of charges then pending, no matter how recent the underlying conduct and how certain it appeared that defendant had engaged in the conduct. These restrictions would obviously make it much more difficult for the judge to determine a sentence on a realistic basis.

There are, of course, circumstances in which the fact of prior conviction itself has a legal consequence which must be eradicated when the conviction is subsequently held invalid. In some state jurisdictions, for example, the length of sentence for certain criminal offenses is automatically affected by the fact that a defendant has been convicted of prior offenses. In these circumstances, the invalidation of the relevant conviction justifies relief from the dependent sentence. *E.g., United States* v. *Garelle,* 438 F. 2d 366 (C.A. 2), certiorari dismissed, 401 U.S. 967; compare *Schram* v. *Cupp,* 425 F. 2d 612 (C.A. 9).

Indeed, this was precisely the situation before the Court in *Burgett* v. *Texas,* 389 U.S. 109, relied upon by the court below. *Burgett* involved a trial held after this Court's decision in *Gideon* v. *Wainwright,* 372 U.S. 335, under procedures permitting the prosecution to introduce evidence of prior convictions dur-

ing trial in order to enhance sentence by proving recidivism.[5] The sentence in *Burgett* was to be determined by the jury; both the minimum and maximum term it could impose was greater if it found the defendant to be a recidivist. The prior conviction introduced in that case was constitutionally infirm, because the record of the conviction failed to satisfy the right-to-counsel standards recognized in *Gideon*. This Court reversed Burgett's conviction, finding the admission of his prior conviction "inherently prejudicial" and not harmless beyond a reasonable doubt.[6] The crux of the holding lies in the Court's statement that "[t]o permit a conviction obtained in violation of *Gideon* v. *Wainwright,* to be used against a person either to support guilt or enhance punishment for another offense * * * is to erode the principle of that case. Worse yet, since the defect in the prior conviction was denial of the right to counsel, the accused in effect suffers anew from the deprivation of that Sixth Amendment right." 389 U.S. at 115.

We submit that the rationale of *Burgett* does not apply to this case. Respondent's prior convictions were not used to prove either guilt or recidivism. As admitted in evidence to impeach, the defective prior convictions were correctly held to be of no consequence

[5] The minimum penalty for a first offense in *Burgett* was two years; Burgett had been sentenced to ten years. See 389 U.S. at 110, n. 1.

[6] The necessity for commenting upon the possibility of harmless error evidently resulted from the jury's fixing the defendant's sentence at ten years, fifteen less than the maximum even for a first conviction for the offense charged.

in the guilt-determining process. Cf. *Sigler* v. *Losieau*, 396 U.S. 988. In the sentencing process, they did not increase the maximum lawful punishment, but merely became elements in the large number of factors considered by the trial judge in determining an appropriate sentence. The actions which underlay the convictions could, as noted above, have properly been taken into account in sentencing even if respondent had never been prosecuted for them. We do not believe that the principle of *Burgett* requires a sentence to be disturbed on such tenuous grounds.

A separate reason for not extending *Burgett* to these circumstances is that the trial in *Burgett* postdated *Gideon*, and the trial judge there should not have treated the earlier conviction as valid. Here the sentencing judge acted in accord with prevailing constitutional doctrine. Since prior convictions are typically known to the sentencing judge, a ruling that this sentence must be reopened would require the reopening of a vast number of sentences. Whenever persons had once been convicted in a manner inconsistent with present constitutional interpretations that are retroactively applied, see *e.g.*, *Roberts* v. *Russell*, 392 U.S. 293; *United States* v. *United States Coin and Currency*, 401 U.S. 715, virtually every subsequent sentence imposed between their conviction and the time of announcement of the new doctrine would be invalid. Such a rule, reaching to the most hypothetical side effects of a conviction, would go far beyond the ordinary rule of retroactivity.

II

THE SENTENCE IMPOSED IN THIS CASE SHOULD NOT BE REASSESSED, BECAUSE THERE IS NO INDICATION THAT THE INVALIDATION OF THE PRIOR CONVICTIONS CAST ANY DOUBT ON THE CONDUCT UNDERLYING THOSE CONVICTIONS

Whatever the appropriate rule in a case in which the invalidation of a prior conviction might bring into doubt the fact of the prior criminal conduct itself, and in which the information before the sentencing judge did not include numerous other factors which might have led him to impose a severe sentence, a sentence should not be reopened when, as here, both these factors are absent.

At trial the prosecution, on cross-examination of respondent, inquired about three prior convictions. Respondent stated that in 1938, at the age of 17, he had been convicted of breaking into a garage, stealing an automobile therefrom, and going on a joy ride. He then described his second offense as a burglary of a New Orleans jewelry store, and his third offense, which was not invalidated,[7] as an armed robbery committed in 1950. At no time during the trial or during the sentencing proceeding did respondent suggest that he had not committed either of the two offenses for which his convictions were subsequently invalidated; significantly in his colloquy with the sentencing

[7] This offense was not involved in the decision by the California court invalidating the other convictions, because it had not been listed in the state indictment (see App. 58–59).

judge (App. 35), respondent denied having committed the 1950 armed robbery, but not the other two offenses. In these circumstances, we submit that the sentencing judge is not likely to have attached any measurable significance to the invalidation of the first two convictions even if he had known at that time that the convictions were constitutionally infirm.[8]

We note, finally, that in addition to the invalidated convictions there were numerous other factors which might have induced the trial judge to impose a severe sentence on respondent. At the sentencing hearing, Judge Harris examined respondent's background and life style in great detail. He heard evidence that respondent had an alias, that he had married a girl who remained totally unaware of his true identity and means of furnishing income, and that he had accumulated valuable assets in spite of never having been gainfully employed. He also considered the 1950 offense for which respondent had counsel,[9] and for which the conviction was never held invalid,[2] and several pending state charges for which respond-

[8] We recognize that for purposes of retroactivity, this Court has stated that the right to counsel guaranteed by *Gideon* is a right whose denial may affect the accuracy of a conviction. See, *e.g.*, *Tehan* v. *Shott*, 382 U.S. 406 416. We do not believe, however, that these holdings imply that the accuracy of convictions obtained against defendants without counsel ought to be doubted in all contexts. In this case, for example, where respondent has never denied the accuracy of the relevant convictions and where these convictions have been only one of numerous factors considered in the imposition of the sentence, we do not believe that the rationale of the retroactivity cases should apply. Cf. Friendly, *Is Innocence Irrelevant? Collateral Attack on Criminal Judgments*, 38 U. Chi. L. Rev. 142 (1970).

[9] We were informed of respondent's having had counsel at this proceeding by the clerk of the Criminal Court of Records of Dade County, Florida.

ent was later convicted (*supra*, n. 2). Thus even if the judge had been less than entirely certain that the subsequently invalidated convictions were accurate, it is unlikely that this would have had a significant impact on his sentencing decision. Consequently, there is no reason here to burden the district court with the task of making an artificial, unrealistic evaluation of the weight which he attached in 1953 to the fact of respondent's conviction for the offenses in question.[10]

CONCLUSION

For the reasons stated, it is respectfully submitted that the judgment of the court of appeals should be reversed.

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[10] It happens that in this case the same district judge who imposed sentence in 1953, Judge Harris, was still on the bench sixteen years later when respondent moved to vacate his sentence. See *Tucker* v. *United States*, 299 F. Supp. 1376 (N.D. Cal.). Judge Harris' written opinion responds solely to the assertion by respondent at that time, that the use of the prior defective convictions for impeachment purposes was reversible error. Although Judge Harris did not discuss the sentencing process, it is likely that if he thought the fact of conviction influenced his sentence, he would have so stated.

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